United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1399

To be argued by
ALLEN R. BENTLEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1399

UNITED STATES OF AMERICA,
Appellee,

—v.—

ERIC ELWOOD MOORE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Eric Elwood Moore appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on August 24, 1976 after a one-day non-jury trial before Hon. Henry F. Werker, United States District Judge.

Indictment 76 Cr. 215, filed in one count on February 27, 1976, charged Moore with threatening to take the life of the President of the United States on October 4, 1975, in violation of Title 18, United States Code, Section 871.

A pre-trial suppression hearing was held on May 24, 1976, and June 2, 1976. On July 7, 1976, Moore waived a trial by jury and agreed to the admission of the testimony at the suppression hearing as evidence at trial. After presentation of additional testimony by one wit-

ness and summations by counsel, Judge Werker rendered a verdict of guilty. On August 24, 1976 Judge Werker sentenced Moore to two years' imprisonment, suspended the execution of sentence, and placed Moore on probation for a period of two years with the special condition that Moore affiliate with Alcoholics Anonymous or a similar program while on probation.

On September 30, 1976, Moore failed to appear for his second monthly interview with his Probation Officer, and a subsequent notice sent to the residence arranged for him upon his release from custody was returned by the Postal Service. On October 15, 1976, a warrant was issued for Moore's arrest. On November 17, 1976, Moore was arrested on the warrant in Albuquerque, New Mexico. Upon being returned to the Southern District of New York, on December 3, 1976 admitted having violated the terms of his probation. Judge Werker then sentenced Moore to the period of two years' incarceration, execution of which had initially been suspended. Moore is now serving his sentence.

Statement of Facts

A. Government's Case

Officer Michael Palumbo of the Westchester County Parkway Police testified at the suppression hearing on May 24, 1976 that on October 3, 1975, at approximately 11:15 p.m., he was parked at a Gulf station on the Hutchinson River Parkway, observing southbound traffic (H. 8).* He saw a station wagon (H. 18) going south

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* Subsequent references to the hearing transcript, the trial transcript, Government exhibits and appellant's brief will be abbreviated as "H.," "Tr.," "GX," and "Br." respectively.

at a low speed (*id.*). One of the tail lights was out, the car was making a loud noise, and no license plate was displayed on the rear of the car; Palumbo thus followed the car and stopped it (*id.*). He approached the car and asked the driver, whom he identified as Moore, to produce his driver's license and registration. When Moore was unable to comply, Palumbo asked for and obtained his name, date of birth and address. Palumbo ran a check with this information, from which nothing positive developed; he went back to Moore and asked for documentary identification (H. 9). At Palumbo's request, Moore stepped out of his car, then into the police car because the night was cold. He was able to produce only "a few pieces of paper." Palumbo, unsatisfied as to Moore's identity, placed him under arrest (H. 10-11). Palumbo informed Moore that he had been arrested for specified motor vehicle violations and gave Moore the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), which Moore said he understood (H. 24). Moore then admitted to having participated in a number of violent acts, said he was going home to see his mother, and stated that he wanted to kill the President of the United States (H. 11-12). Moore told Palumbo he had been involved with narcotics; Palumbo performed an "inventory search" of Moore's car, which was full of papers, boxes and blankets "in complete disarray" and found a small plastic package containing traces of white powder, which Moore said was heroin (H. 13-14).

Palumbo testified that two passengers, a man and a woman, had been in the car with Moore. The passengers stated that he had picked them up in Boston that morning and that in return for gas money he was driving them to North Carolina, or if he changed his mind, to Florida (*id.*). The passengers were allowed to leave; Palumbo testified that they headed for the North White Plains

Railroad Station (H. 15). Palumbo drove Moore in the police car to Parkway Police headquarters in Hawthorne, New York (*id.*, H. 34). At headquarters, Palumbo testified, Detective Rice again gave Moore the *Miranda* warnings; Rice then followed through with the paperwork involved in booking the defendant (H. 34).

Palumbo's hearing testimony was followed by that of Special Agent William L. Kehoe of the United States Secret Service. Kehoe testified that he had been notified of Moore's arrest by the Westchester County office of the Secret Service on the morning of October 4, 1975 (H. 42). Kehoe and Agent Charles DeVita then went to the headquarters of the Parkway Police, where he interviewed Rice, then Moore (*id.*). He began his conversation with Moore by advising Moore of his *Miranda* rights. In response to Kehoe's question about his reputed interest in President Ford, Moore made statements to the effect that he had planned to assassinate the President (H. 44). On October 6, 1976, Moore was again given *Miranda* warning by Agent Kehoe; on that occasion, Moore read and signed a printed form acknowledging that he understood his rights (GX 2).

The suppression hearing continued on June 2, 1976, with the testimony of Detective Charles Rice of the Westchester County Parkway Police. Rice testified that at about 12:30 a.m. on October 4, 1975, he had received a call at home from the desk officer at Parkway Police headquarters; following the call, Rice went to headquarters, where he met Moore (H. 69, 75). After learning from Moore that he had been advised of his rights by Palumbo, Rice showed Moore a *Miranda* warning card and asked him if he could read; Moore replied that he could. Moore read the card and said that he fully understood it (H. 70). Rice talked with Moore for about an hour and, since Moore was unable to post

the $200 bail (H. 88), lodged him in a cell at the Parkway Police headquarters (H. 71-72). After putting Moore into the cell, Rice went out to the parking lot and examined the contents of Moore's car. Amidst a melange of sleeping bags, papers, dirty clothes and tires, Rice found a brown paper bag containing a woman's dress, false eyelashes and a woman's wig (H. 72). He brought the bag and its contents inside and later turned them over to the Secret Service agents (H. 73). Everything else was placed inside the car, which was then locked (*id.*). At about 2:15 a.m., before leaving for home, Rice called a Sheriff's office in North Carolina in an attempt to verify Moore's statement that a North Carolina warrant was outstanding for his arrest (H. 85). No such warrant was found by the Sheriff's office (*id.*).

Rice testified that at shortly after 9:00 a.m. the following morning, October 4, 1976 (H. 78), he returned to work, brought Moore to the detective division, and made unsuccessful attempts to locate a judge (H. 73). After a call to Moore's mother (H. 72), Rice again advised Moore by use of the *Miranda* card (H. 87) and questioned Moore further (H. 73). After fifteen minutes or a half hour (H. 80), Moore told Rice that he was depressed over the work situation, that he blamed the situation on the President, and that he was travelling around the country "to try to kill the President, if he possibly could" (H. 74). Moore referred to a map found on the front seat of his car, bearing certain notations, as his plan (H. 74). After hearing these statements Rice called the Secret Service at about 9:30 a.m. (H. 77, 88). He then stopped questioning Moore and engaged him in general conversation over coffee while awaiting Agent Kehoe (H. 89), who arrived at about 9:50 a.m. (H. 88).

After denial of the suppression motion, trial was set for July 7, 1976. At the commencement of trial on that

day, Moore waived a jury and stipulated to the admission of the minutes of the suppression hearing at trial. The Government then recalled Agent Kehoe. Kehoe testified that on October 4, 1975, Moore had told him he was planning to purchase a "Saturday night special" and to use it to assassinate President Ford (Tr. 5). Moore said he had been following the President around the country; his plan, he said, was to commit the assassination while disguised in a woman's wig, eyelashes and dress which he owned, then to remove the disguise to facilitate his escape (Tr. 5-6). Moore avowed that he did not care about the consequences of his act, or, indeed, about his success in escaping (Tr. 6). Moore stated that if released on bail or not arrested, it was his intention to carry out the assassination plan (*id.*). Kehoe then identified the pair of women's eyelashes (GX 5) and the wig (GX 6) that he had received from Detective Rice; these exhibits were subsequently received in evidence over objection (Tr. 22). Kehoe did not know what had become of the dress (Tr. 7).*

Kehoe then testified that on October 6, 1975 he had taken Moore to the offices of the Secret Service at 90 Church Street, in New York City (Tr. 8). There he again advised Moore of his constitutional rights at which point Moore again stated that he was planning to assassinate President Ford (*id.*). From the Secret Service offices Kehoe and Moore proceeded to the offices of the United

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* Judge Werker, in an opinion filed June 11, 1976, denying the motion to suppress Moore's statements, had suppressed the eyelashes, wig and dress as the product of an illegal search. On the morning of trial, however, he granted the Government's earlier filed motion to reargue that decision and held, in light of *South Dakota* v. *Opperman*, — U.S. —, 44 U.S.L.W. 5294 (July 6, 1976), that admission of the tangible evidence found in Moore's car was not constitutionally impermissible (Tr. 2).

States Attorney for the Southern District of New York. In the presence of Kehoe, Moore was interviewed by Assistant United States Attorney Marc Marmaro. Marmaro advised Moore of his constitutional rights; Moore then gave oral statements to Marmaro, after which he read Marmaro's notes (GX 4) and signed them. The notes were received in evidence without objection (Tr. 9). In the statement, Moore said he was coming from Boulder, Colorado, and had been working with wigs, eyelashes and drugs. Moore stated that after breaking up with a girl in Boston he had gone to see where the President was, and that he had been on his way to Florida "to think and plan." Moore acknowledged telling Palumbo that he was on his way to assassinate the President. When Marmaro asked if he really intended to assassinate the President, Moore replied that he doubted that he would have succeeded in killing the President; he might have "given him a scare" but he did not think he would have "hit him."

Kehoe testified, finally, that he had not noticed anything unusual about Moore's behavior, appearance or speech (which was coherent and understandable) on either October 4th or 6th (Tr. 10).

The defendant did not present any evidence.

ARGUMENT

POINT I

There Was Ample Evidence to Sustain the District Court's Finding that Moore Knowingly and Wilfully Threatened to Take the Life of the President of the United States.

Point I of Moore's brief, pp. 11-15, asserts two grounds for reversal of the conviction. First, Moore claims that Judge Werker committed factual error in finding that Moore had made threats, rather than admissions of past threats, when questioned by the Secret Service agents on October 4, 1975. Second, Moore contends that even if one finds his statements constituted present threats, the Government failed to adduce evidence sufficient "to establish a serious intention to injure the President." Br. p. 13. Both claims are untenable.

A. Judge Werker's Finding that Moore's Statements to Kehoe Were Present Threats Was Correct.

Moore contends that his statements to Kehoe on the morning of October 4, 1975, represented a confession of past threats rather than the expression of a present threat to take the life of the President. The claim is based on Kehoe's testimony at the suppression hearing that he had asked Moore about "what statements he had made" (H. 57) and that Moore had told him that he "had been" following the President around the country and "had been" planning to assassinate him (H. 44). This pseudo-linguistic analysis of the testimony is meritless.

Initially, we note that Kehoe's hearing testimony, even when the tense chosen by Kehoe is read literally, is

not inconsistent with a finding that Moore made a present threat on the morning of October 4th. Kehoe was not asked, either at the hearing or at trial, to quote Moore's exact words. The tense Kehoe chose for the paraphrase he provided at the hearing ("had been") was an appropriate means of recapitulating statements that had been made by Moore either in the past perfect tense (*e.g.*, "I *had* been planning to kill the President") or in the present perfect tense (*e.g.*, I *have* been planning to kill the President"). Indeed, the English language did not afford Kehoe any means of paraphrasing Moore's statements in the past tense and simultaneously making it clear whether Moore had used the past perfect or present perfect tense. If Moore had used the present perfect tense, the trier-of-fact could properly find a threat within the meaning of § 871. Cf. *Roy* v. *United States*, 416 F.2d 874, 876 (9th Cir. 1969).

Kehoe's trial testimony, moreover, made it clear that Moore on October 4, 1975, had pronounced present threats on the President, rather than admitting to having made threats in the past. Kehoe's testimony that Moore told him he (Moore) was planning to kill the President established that Moore had used the present tense in speaking to Kehoe about his assassination plans. Kehoe's testimony that additional threats were made by Moore on October 6, 1975, after Kehoe had taken custody of Moore from the local authorities, provided further evidence of Moore's statements on October 4th and, whatever the words Moore had used on October 4th, of his unchanged intent to make a present threat against the President.

Kehoe was plainly not an accomplished grammarian; on redirect examination at the hearing, Kehoe testified that Moore said he "was planning" to assassinate the President (H. 62). There is nothing in the record to support the technical construction that Moore urges

Kehoe's hearing testimony be given. In any event, Judge Werker properly resolved whatever conflicts were to be found within Kehoe's testimony, characterizing the argument now advanced on this appeal as "a matter of semantics" which had "gone too far." (Tr. 46). Judge Werker's factual finding that Moore's threats to Kehoe were present ones, not acknowledgements of threats previously made, should not be overturned. Finally, if Moore had seriously contended at trial that the evidence showed only a confession of past threats, he could have requested specific findings of facts pursuant to F. R. Crim. P. 23(c). Having failed to do so, any ambiguities—especially those found in favor of the Government by the trier-of-fact—should not be resolved on appeal in favor of Moore. *United States* v. *Bommarito*, 524 F.2d 140, 144 n.5 (2d Cir. 1975).

B. The Evidence Fully Supported the Finding that All the Elements of the Offense Were Established.

In *United States* v. *Compton*, 428 F.2d 18 (2d Cir. 1970), *cert. denied*, 401 U.S. 1014 (1971), this Court held the following rule applicable to the determination of wilfulness under 18 U.S.C. § 871:

> "This Court therefore construes the willfulness requirement of the statute to require only that the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President, and that the statement not be the result of mistake, duress, or coercion. The statute does not require that the defendant actually intend to carry out the threat."

Id. at 21, quoting from *Roy* v. *United States*, 416 F.2d 874, 877-878 (9th Cir. 1969).

The facts and circumstances shown by the evidence in this case provide more than ample support for a finding that a reasonable man in Moore's place on October 4, 1975, would have foreseen that Agents Kehoe and DeVita would construe his remarks as "a serious expression of an intention to . . . take the life of the President." * A reasonable man in Moore's position would have known that he had been stopped while driving on one of the major arterial highways between Boston and New York, and that at New York easy connections to other highways leading to Washington and points south were to be found. Although President Ford was not travelling to Moore's vicinity, *compare Roy* v. *United States*, *supra* (President Johnson expected to arrive at military base from which threatening call was placed), Moore could be found to have known that the agents had been told by Rice that he had been travelling south on the Hutchinson River Parkway in his own car when arrested, and that the car was equipped with sleeping bags and other paraphernalia for long-distance travelling. Moore nonetheless told Kehoe that he had been "following [President Ford] around the country," planning to assassinate him. (Tr. 5-6). Moore knew that his vehicle contained a woman's wig, a dress

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* Moore's argument, Br. p. 12, suffers from a misreading of the standard articulated in *Compton*: the reasonable man to whom the test refers is not, as Moore claims, the person to whom the alleged threat is made. Rather, the issue is whether a reasonable person making the statement in question could have foreseen, under all the circumstances, that the statement would be taken as a threat. Thus, in considering the evidence adduced in support of an alleged violation of § 871, one must focus on the facts and surrounding circumstances known to the defendant when the statement was made.

and eyelashes—not packed with any other luggage, but separately contained in a brown paper bag. He nonetheless told Kehoe that he had those articles and was going to use them as a disguise to facilitate the assassination.

A reasonable man in Moore's situation on October 4th would have been aware, in addition, of all that had transpired during the preceding 12 hours. Specifically, Moore had threatened the President in Palumbo's presence on the previous evening and had also professed membership in a number of violent groups and claimed to have participated in a bombing at Logan Airport. Moore had made statements to Rice on the morning of October 4th—including an explanation that the markings on a map taken from his car represented his assassination route—which Rice took as threats against the President. Rice had contacted the Secret Service after hearing Moore's threats; thus Moore must have known that the substance of his prior statements to the local authorities had been communicated to the Secret Service.* Finally, Kehoe's testimony that it was his routine practice to warn a suspect who had reportedly threatened the President that such a threat was a violation of Federal law (H. 57) permitted to Judge Werker to find that Moore had been so advised

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* Moore's argument that his claimed radical associations should be disregarded because Kehoe "did not bother to investigate" them, Br. p. 14, is unfair, for Kehoe was unaware of them until the date of trial (Tr. 16-17). In our view, moreover, the fact that Kehoe was not told of Moore's claimed violent associations and past violent deeds, stressed by Moore, Br. p. 13, is irrelevant: the issue is what *Moore* could be found to have thought. As a matter of both logic and practical experience, the determination of whether a defendant has violated § 871 must be based on the surrounding facts at the time the alleged threat is made; it does not depend on whether or not subsequent governmental investigation confirms or refutes the defendant's claim to violent intentions.

in this case. Federal Rules of Evidence, Rule [illegible] Upon being so advised, Moore must have inferred that either Palumbo or Rice, or both of them, had interpreted his earlier remarks as threats. In spite of all this, Moore reiterated his threatening statements to Kehoe.

Viewing the evidence in the light most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974), there was considerably more than substantial proof from which Judge Werker could find that Moore was well aware of surrounding circumstances from which he could reasonably "foresee that the statement would be interpreted by [Kehoe and DeVita] as a serious expression of an intention . . . to take the life of the President. . . ." *United States* v. *Compton*, *supra*, 428 F.2d at 21; *United States* v. *Lincoln*, 462 F.2d 1368 (6th Cir.), *cert. denied*, 409 U.S. 972 (1972). Since there was also ample evidence that the statement was not made in jest or as a matter of political hyperbole, see *Watts* v. *United States*, 394 U.S. 705 (1969),* the District Court's finding of guilt was clearly warranted by the evidence.

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* This evidence included that the fact that the threatening statements were reiterated some five times over a period of four days, notwithstanding that Moore had been given the *Miranda* warnings at least six times during that period.

References in appellant's brief to his prior treatment for mental illness and his statements as having been "ravings" and "obviously incredible." Br. pp. 6, 13, 14, are particularly inapposite in view of the fact that no defense based on insanity, diminished responsibility or lack of *mens rea* was raised, and in view of Kehoe's testimony that Moore's appearance, behavior and speech at the time the statements were made were not unusual. Tr. 10.

POINT II

Moore Was Properly Found to Have Made a Statement Which a Reasonable Person Would Have Foreseen Would be Construed as a Threat Against the President; No Greater Showing Should be Required to Establish a Violation of Section 871.

In Point II of his Brief, pp. 16-19, Moore asks this Court to reexamine *United States* v. *Compton*, 428 F.2d 18 (2d Cir. 1970), and cases to like effect decided in other Circuits. *United States* v. *Rogers*, 488 F.2d 512 (5th Cir. 1974), *rev'd on other grounds*, 422 U.S. 35 (1975); *United States* v. *Lincoln*, 462 F.2d 1368 (6th Cir.), *cert. denied*, 409 U.S. 952 (1972); *United States* v. *Hart*, 457 F.2d 1087 (10th Cir.), *cert. denied*, 409 U.S. 861 (1972); *Roy* v. *United States*, 416 F.2d 874 (9th Cir. 1969); *Watts* v. *United States*, 402 F.2d 676 (D.C. Cir. 1968), *rev'd on other grounds*, 394 U.S. 705 (1969). He urges that this Court follow the Fourth Circuit, see *United States* v. *Patillo*, 431 F.2d 293 (4th Cir. 1970), *aff'd en banc*, 438 F.2d 13 (1971), in requiring not only proof that the threat was wilful as provided in *Roy*, *supra*, and *Compton*, *supra*, but proof of specific intent to carry out the threat or to disrupt Presidential activity. Since none of the unusual circumstances that may on rare occasions prompt reexamination of an established authority are present in this case, this Court should apply the principle of *stare decisis* and adhere to the rule laid down in *Compton*.* In any event,

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* Since Moore's counsel at trial did not urge Judge Werker to apply the higher standard for which he now contends, see Tr. 25-26, Moore's attack on *Compton* is in any event barred. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). This is especially true since, as noted, Moore did not request specific findings of fact to allow this Court to determine if Moore was properly found by the trier-of-fact to have met the higher standard.

the facts of this case vividly demonstrate the evils the statute was intended to cure. As indicated above, Moore's statements to the various policemen and agents with whom he spoke caused considerable turmoil and activity among those responsible for guarding the President. As the Ninth Circuit noted, in *Roy, supra*, 416 F.2d at 878, acts "set[ting] in motion emergency security measures that might have impeded the President's activities and movement and which certainly resulted in additional investigatory and precautionary activities" were precisely the sort of activity that § 871 was designed to prevent.

In short, this Court's prior ruling should not be changed.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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